No. 88-1905

In The

Supreme Court of the United States

October Term, 1989

EDDIE KELLER; RAYMOND BROSTERHOUS; DAN M. KINTER; DAVID LAMPE; GARRETT BEAUMONT; CHRISTOPHER L. FAIRCHILD; JOHN A. GORDNIER; CHRISTOPHER N. HEARD; LEONARD C. HOAR, JR.; J. ROBERT JIBSON; CHARLES P. JUST; DAROLD D. PIEPER; THOMAS HUNTER RUSSELL; NANCY L. SWEET; MICHAEL J. WEINBERGER; DAVID E. WHITTINGTON; THOMAS R. YANGER; WARD A. CAMPBELL; DONALD C. MEANEY; ASSEMBLYMAN PATRICK J. NOLAN; and A. WELLS PETERSEN,

Petitioners,

v.

STATE BAR OF CALIFORNIA, a public corporation; ANTHONY M. MURRAY; PATRICIA GREENE; GIRT K. HIRSCHBERG; LELAND R. SELNA, JR.; GEOFFREY VAN LOUKS; THOMAS W. ERES; JOHN H. COSTANZO; GEORGE W. COUCH, III; BURKE M. CRITCHFIELD; THOMAS R. DAVIS; DIXON Q. DERN; RUTH CHURCH GUPTA; DALE E. HANST; LEONARD HERR; ROBERT A. HINE; MARTA MACIAS; PHILLIP SCHAFER; CRAIG A. SILBERMAN; DANIEL J. TOBIN; JAMES D. WARD; and JOON HEE RHO,

Respondents.

On Writ Of Certiorari To The Supreme Court Of California

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Petitioners, Eddie Keller, *et al.*, submit this reply brief to correct erroneous allegations of the respondents' brief

and to emphasize what appears to have become the central issue in this case--the nature of the State of California's interest in compelling all attorneys to belong and pay dues to an expressive association.

Initially, it is instructive to note the wide divergence of opinion between the State Bar of California (Bar), and the amici supporting its position. While the Bar continues to insist that there is no First Amendment issue in this case, amici, State Bar of Michigan and South Carolina State Bar, readily and forthrightly admit that compelled payments to a state bar do constitute an infringement on First Amendment rights. Similarly, while the Bar seeks to paint all of its ideological pronouncements as "government speech," amicus Lawyers' Committee for the Administration of Justice (led by James Brosnahan and made up of various individuals active in Bar programs and activities) claims that the Bar's positions are in reality the positions of the Bar's members, arrived at after full debate. In other words, while the Bar claims that there is no identity between the message and the members of the Bar, the Lawyers' Committee amicus, made up of former Bar presidents, board members, and activists, argues precisely the opposite. Thus, even with amicus "support," the Bar stands alone in many of the positions it takes before this Court.

Perhaps the most telling feature of the Bar's brief is its failure to address any of the decisions of other state Supreme Courts and Circuit Courts of Appeals that are in conflict with the decision here under review. Indeed, there is no rational point of distinction between those decisions and this case. The State of California has chosen to compel all attorneys to belong and pay dues to an

expressive association as a condition of practicing law in the state. The question before this Court is whether the interests of the state justify compelling attorneys to help finance political and ideological activities of the Bar with which they disagree. As we shall demonstrate, no such interest has been identified in this case.

ARGUMENT

I

MANDATORY MEMBERSHIP IN AND COMPELLED DUES PAYMENTS TO THE STATE BAR IMPLICATE FIRST AMENDMENT RIGHTS

The issue squarely presented in this case is whether compelled membership in and payments to an expressive association implicate First Amendment liberties.[1] The decisions of this Court in *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); and *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), clearly hold such compulsion to infringe on First Amendment rights of speech and association. Relying on cases decided under the Equal Protection Clause (Respondents'

[1] Despite the Bar's assertion to the contrary (Respondents' Brief on the Merits at 13), nothing in this Court's decision in *Lathrop v. Donohue*, 367 U.S. 820 (1961), requires this Court to give preclusive effect to the determination of the California Supreme Court that the so-called "government speech" doctrine is the appropriate mode of analysis in this case.

Brief on the Merits (RB) at 15), the Bar labels its advocacy as "government speech" and argues that its compelled membership has no right to complain. This argument stands in marked contrast to the Bar's later claim that petitioners in this case are merely disputing the majority will of Bar members (RB at 21),[2] or that petitioners are seeking to enjoin the speech of delegates to the Bar's Conference of Delegates (RB at 23-24).

The most glaring error in the Bar's analysis is its reliance on Justice Harlan's concurring opinion in *Lathrop* for the proposition that First Amendment rights are not implicated by compelled membership in or fee payments to an expressive association. RB at 27. While this view is articulated in Justice Harlan's concurring opinion in *Lathrop* as well as in Justice Frankfurter's dissenting opinion (in which Justice Harlan joined) in *Street*, this Court's decision in *Abood* is a clear repudiation of that argument.

The Bar's argument also ignores its own structure and financing. As noted in the opening brief, the Bar is specifically exempt from the laws applicable to other government agencies. Petitioners' Opening Brief at 3. Its

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[2] The Bar provides neither evidence nor record citation for its claim of "majority" support. Indeed, in a plebiscite vote of all members of the Bar, the membership was almost evenly split on the question of whether the Bar should be limited in its lobbying to "technical code revision, court reform, and other issues directly related to the regulation of the legal profession." Petition for Writ of Certiorari, Appendix F-44 and 45. When asked how the Bar should finance lobbying that was *not* limited to technical code reform and the like, 69.2% answered that such activity should be financed by *voluntary* contributions. *Id.* at F-45 and 46.

expenditures are not subject to review of the Legislature through the appropriation process or review of the Governor pursuant to his line item veto power. Its members exist only by force of legal compulsion. The financing for its political advocacy is derived from compelled annual membership dues payments. As explained by the Third Circuit, there exists in this case a "coerced nexus between the individual and the specific expressive activity." *United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989).

II

THE BAR HAS FAILED TO IDENTIFY A STATE INTEREST THAT WOULD JUSTIFY THE INFRINGEMENT ON PETITIONERS' FIRST AMENDMENT RIGHTS

As petitioners have already conceded, the First Amendment rights asserted in this action are not absolute. The infringement on the freedom of speech and association inherent in the compelled membership and dues payments may be justified if supported by a sufficient governmental interest. Petitioners contend that that interest must be compelling, and that there must be an absence of a means of fulfilling that interest in a manner less injurious to First Amendment rights. The Bar has failed to identify any such interest in this case.

A. The Bar Must Demonstrate a Compelling Governmental Interest

In disputing the applicability of the compelling state interest/least drastic means test to this case, the Bar both ignores and misconstrues the decisions of this Court. In

Roberts v. United States Jaycees, this Court, citing *Abood*, ruled that interference with the First Amendment freedom of association may only be justified by a compelling state interest. *Roberts*, 468 U.S. at 623. The applicability of this analysis to cases involving compelled political contributions was affirmed in *Chicago Teachers Union v. Hudson*, 475 U.S. at 303 n.11. The Bar's dispute with this conclusion is twofold. To begin with, the Bar believes that the nature of the rights at stake are very limited. RB at 40. Secondly, the Bar misconstrues prior rulings of this Court to argue that the test is one of "germaneness." *Id.* at 9, 32.

The rights asserted by petitioners in this case are neither limited nor unimportant. In *Abood*, this Court held that the right to refrain from contributing to political causes with which one disagrees is no less protected by the First Amendment than the right to contribute in support. *Abood*, 431 U.S. at 233-35. This freedom was characterized as being at the core of the First Amendment. *Id.* The Bar's only response on this point is to reiterate the view of Justice Harlan in his concurring opinion in *Lathrop* that was ultimately rejected by this Court in *Abood*. *Compare Lathrop*, 367 U.S. at 860-61 (Harlan, J., concurring) *with Abood*, 431 U.S. at 233-35.

The Bar, citing *Abood*, argues that the standard to be applied in this case is one of "germareness" rather than compelling state interest. RB at 9, 32. The flaw in this argument is that it skips a step in the analysis. While it is certainly true that the expenditures challenged must be "germane" to some governmental interest, that interest must be one that is compelling. *See Hudson*, 475 U.S. at 303 n.11; *Roberts*, 468 U.S. at 623. The requirement that specific expenditures under challenge must be "germane"

to that state interest is nothing more than the requirement that the compelling government interest is actually advanced by the challenged regulation. *See Roberts*, 468 U.S. at 623-24. Thus, in order to justify compelled membership and dues payments in support of the political activities challenged in this case, the Bar must establish that it is acting pursuant to a compelling governmental interest that is actually advanced by the contested regulation and cannot be accomplished by a means less injurious to First Amendment values. This, the Bar has failed to do.

B. The Bar Has Failed to Identify a Compelling Governmental Interest

Throughout its brief, the Bar claims to be acting in the "public interest" and to be aiding the "administration of justice." According to the Bar, it is its "administration of justice" functions that justify all of the challenged conduct. As used by the Bar (and the court below), the phrase "administration of justice" is nothing more than a shibboleth--a slogan devoid of meaning. The Bar makes no attempt to give that phrase any meaning, and indeed seeks to incant it in talismanic manner to support lobbying on issues as diverse as environmental protection and criminal penalties. RB at 22. Indeed, the court below ruled that applied to the Bar the term "administration of justice" was to be construed "broadly." After all, as that court noted, "[l]aws are the business of lawyers. . . . Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with the needed expertise, whose collective advice can lead to significant improvements in the legislative proposal."

Joint Appendix (JA) Vol. III at 579. This is to be compared with the use of the term "administration of justice" by the Wisconsin Supreme Court under review in *Lathrop*. The duty of the Wisconsin Bar committee charged with improving the "administration of justice" was to

> " 'study the organization and operation of the Wisconsin judicial system and shall recommend from time to time appropriate changes in practice and procedure for improving the efficiency thereof; and in that connection shall examine all legislative proposals for changes in the judicial system.' " 367 U.S. at 829 n.7.

Even Justice Harlan, on whose concurring opinion the Bar relies heavily (RB at 45), viewed the proposed lobbying activities of the Wisconsin Bar as being limited to "the more or less technical areas of the law into which no well-advised laymen would venture without the assistance of counsel." *Lathrop*, 367 U.S. at 864 (Harlan, J. concurring).

Contrast this with the California Bar's lobbying program that included such diverse issues as environmental law, comparable worth, armor piercing bullets, lifeline public utility rates, Aid to Families with Dependent Children, drug paraphernalia, low rent housing projects, and solid waste management plans, to name a few. JA Vol. I at 9-12.[3]

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[3] For the first time in the seven year history of this litigation, the Bar attempts to inject a factual dispute. In its brief, the Bar claims that the "activities identified in the complaint are not supported by the record." RB at 5 n.3. This is a novel claim

(Continued on following page)

The Bar also attempts to rely on this Court's recent decision in *Mallard v. District Court of Iowa*, 490 U.S. ___, 104 L. Ed. 2d 318 (1989), to defend compelled support of its political programs. The Bar's argument is that lawyers have special obligations as officers of the court, and that these obligations are fulfilled through the aspects of an integrated bar association here under review. RB at 31, 45. *Mallard* does not stand for this proposition. Instead, the cited portions of *Mallard* refer to an *individual* attorney's ethical obligation to represent indigents. *Compare* RB at 31, 37, 45 *with Mallard*, 104 L. Ed. 2d at 332.

Absent from the Bar's argument is the source of any alleged "special obligation" of attorneys to render political judgments on a nuclear weapons freeze proposal or on handgun control. *See* JA Vol. I at 13. Nor does the Bar attempt to identify the nature of any "special privilege" of lawyers that would justify compelling all California attorneys to contribute to a lobbying program that considers such diverse topics as joint custody and armor piercing bullets. No such "professional obligation" exists. Further, to the extent that attorneys as officers of the

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for the simple fact that the complaint was verified (JA Vol. I at 8-9) (and is therefore part of the evidentiary record) and the fact that each of the listed pieces of legislation on which petitioners claim the Bar lobbied also appear on the Bar's lobbying report filed with the California Secretary of State. *Compare* JA Vol. I at 9-12 *with* JA Vol. II at 241-45. Furthermore, the Bar's own brief admits to some of the challenged lobbying. *E.g.*, RB at 22. It is simply too late in the day to contest the indisputable facts of this case.

court, owe "special obligations" to society, those obligations are of an ethical and individual nature. It is difficult to imagine the existence of an ethical obligation that can be satisfied by paying another to make political judgments on your behalf.

Finally, the Bar offers two separate defenses for the activities of the Conference of Delegates. First the Bar claims that the conference is analogous to the union conventions for which compelled fees were upheld in this Court's decision in *Ellis*. RB at 23. The failing of this argument lies in the failure of the Bar to analyze *why* the *Ellis* Court reached that result. In *Ellis*, this Court noted that the union in that case elected its officers at the national conventions in question. 466 U.S. at 448-49. Since the convention was necessary to maintenance of the union's corporate structure, compelling fee payers to finance those conventions was proper. *Id*. By contrast, the Bar is neither compelled to hold a Conference of Delegates, nor does it elect any of its officers at the conference. Indeed, the conference is not even open to all California attorneys. Instead, it is meant to be a conclave of local voluntary bar associations. JA Vol. II at 368. The *Ellis* decision thus provides no support for compelling petitioners to finance conference activity such as adopting resolutions in favor of ballot propositions concerning handgun control and a nuclear weapons freeze.

The Bar also argues that participants at the Conference of Delegates are exercising their own First Amendment rights, and petitioners therefore are prohibited from restraining or interfering with the activities of the conference. Aside from the obvious conflict with the Bar's "government speech" argument, this argument must fail

for the simple reason that the delegates have no First Amendment right to require others to finance or amplify their own speech.[4] Petitioners do not seek to foreclose any debates. They seek only to be free from the compelled association with and financing of such debates. The Bar, an association with no voluntary members, simply has no countervailing First Amendment rights to assert.[5]

CONCLUSION

The Bar studiously ignores the nature of the activity challenged in this action. This case does not challenge the Bar's power to appoint a member to the Law Revision Commission or to advise the Governor of the qualifications of judicial appointees. Nor are the Bar's efforts to provide legal counsel to the indigent under attack.

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[4] This Court's decision in *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364 (1984), is not to the contrary. That case does not hold that government may be compelled to subsidize speech, but only that if government does choose to subsidize speech, it may not discriminate on the basis of the content of the speech it will subsidize. *Id*. at 383-84.

[5] It is interesting to note that the conference is made up of representatives from *voluntary* bar associations. The members of those associations are free to resign should the association adopt viewpoints in conflict with their own. Similarly, the members of those organizations have a constitutional right to associate to advance political causes. *See Abood*, 431 U.S. at 233. The State Bar, however, has no voluntary members. Petitioners cannot withdraw from membership in a dispute over the Bar's political agenda without also forfeiting their right to practice law in the state.

Instead, it is the Bar's political and ideological advocacy unrelated to the regulation of the practice of law or improvement of the judicial system that is challenged. The Bar only briefly addresses these concerns by claiming that it has worked to "improve" environmental protection and has ensured "fair" criminal penalties. RB at 22. The Bar also claims to have improved the "quality" of the laws. RB at 37. Each of these claims are themselves subjective political judgments. Who is to say what is a "fair" criminal penalty? Who makes the determination of whether environmental protection has been "improved"? Under our system of governance, those questions are left, at least initially, to the political branches of government. It is for this reason that this Court has suggested that those elements of government may speak out on controversial issues. The Bar, however, has no assigned role to play in such determinations. There exists no compelling state interest for California to require petitioners, and all other attorneys, to belong and pay dues to the Bar for the purpose of advancing these political judgments. The decision of the California Supreme Court must, therefore, be reversed.

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Respectfully submitted,

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